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No. E. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,
Respondent.

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF FOR RESPONDENT.

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No. 395.

IN THE

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OCTOBER TERM, 1929.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
Respondent.

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF FOR RESPONDENT.

Statement.

Respondent brought this suit to enjoin the enforcement (as interpreted by the Commission) of a condition inserted by the Commission in an order authorizing the issuance of securities by respondent (hereinafter sometimes called the New Company) for the object of acquiring the properties of Chicago, Milwaukee & St. Paul Railway Company (hereinafter called the Old Company) which had theretofore been sold at foreclosure sale under a plan of reorganization. All material allegations of the

petition were admitted by the answers, and the case tried below on bill and answer, and a decree entered enjoining the condition complained of.

1. Appointment of Committees and Reorganization Managers and formulation and adoption of Reorganization Plan.

The properties of the Old Company were placed in receivership in the District Court for the Northern District of Illinois on March 18, 1925 (R. 1-2). That Court, in its administration of the Receivership, is hereinafter referred to as the Receivership Court.

Protective Committees were formed by certain of the preferred stockholders, common stockholders and bondholders of the Old Company. At their request, Kuhn, Loeb & Co. and The National City Company (hereinafter called the Managers) prepared and submitted a Plan of Reorganization (hereinafter called the Plan), which was approved by the Committees, and Kuhn, Loeb & Co. and The National City Company were designated as Reorganization Managers (R. 2-3). The Plan was a contract between the Committees, the Managers and the depositing security holders, to which neither the Old Company nor the New Company was at any time a party.

As authorized by the Plan, the Managers designated and employed numerous banks and trust companies at many places in the United States and Europe to act as depositaries under the Plan, to receive the securities deposited; and, as authorized by the Plan, the Managers and the Committees employed counsel and incurred expenses in the performance of the duties imposed upon

them by the Plan (R. 3, 4-5). The Committees, the Managers, their respective counsel, and the depositaries and sub-depositaries, acted at all times as agents of the depositing security holders.

The problems presented by the reorganization of the Old Company were complicated and various, and in addition to incurring counsel fees and expenses in connection with the formulation of the Plan and the protection of the interests of the security holders, the Managers and the Committees became involved in protracted litigation with dissenting security holders owning a substantial amount of the securities of the Old Company (R. 5). This litigation culminated in the approval of the Plan by the Receivership Court (15 F. 2d, 434*), affirmed by Circuit Court of Appeals, *Jameson* v. *Guaranty Trust Co.* (20 F. 2d, 808), and writ of *certiorari* denied by this Court (275 U. S. 569).

2. Creation under the Plan of a special fund for the payment of the fees and expenses of the agents and representatives of the depositing security holders, at the expense of such security holders, against which fund no securities of the New Company were to be issued and in which fund the New Company had no interest.

The Plan provided that the stockholders of the Old Company might become parties to the Plan and participate in the proposed reorganization by depositing their stocks under the Plan and by paying to the Managers $28 in respect of each share of preferred stock and

*The title of the case in the District Court is *Guaranty Trust Co.* v. *Chicago, M. & St. P. Ry. Co.*

$32 in respect of each share of common stock of the Old Company held by them. Against these payments, but $24 and $28 respectively in new securities of the New Company were to be issued (R. 50-51). The stockholders' assessments thus exceeded by $4 per share the amount of the new securities to be issued against them. This excess is hereinafter sometimes referred to as the uncapitalized portion of the assessments. Out of such portion, the Plan expressly provided (R. 40) that there should be created a special fund (referred to herein and in the petition as the Trust Fund) as follows:

> "From this amount a sum equal to $1.50 per share of the existing Preferred Stock and Common Stock of the Railway Company will be set aside to provide for the compensation of the Reorganization Managers and the Committees fixed as hereinafter on page 22 provided, and the fees and disbursements of their counsel and all depositaries and sub-depositaries, any balance of said sum to be paid over to the New Company as additional working capital or, if the Reorganization Managers in their discretion shall so determine, to be returned *pro rata* to the holders of certificates of deposit for stock."

The Reorganization Agreement, of which the Plan constituted a part, further provided (R. 65):

> "All holders of certificates of deposit for Preferred Stock or Common Stock of the Railway Company severally and respectively agree, for themselves and their respective transferees and assigns, that out of the cash payments of $28 per share of Preferred Stock and $32 per share

> of Common Stock made by them $1.50 per share may be used by the Reorganization Managers in their absolute and uncontrolled discretion, whether before or after the Plan has been abandoned, to pay the fees and disbursements of the counsel of the Reorganization Managers and the Committees and the fees and disbursements of all depositaries and sub-depositaries and, if the Plan shall not be abandoned, to pay the compensation of the Reorganization Managers and the Committees."

The compensation to be paid to the Managers by the depositing security holders was fixed by agreement in the Plan itself, and the Managers, as agents of the depositing security holders, were authorized to fix the compensation of the Committees, depositaries, sub-depositaries and counsel (R. 56).

The total cash requirements of the reorganization, including the creation of the Trust Fund, were stated in the Plan to be $70,032,548, all of which was to be raised from the stockholders' assessments. The amount attributable to the capitalized portion of these assessments was to be used largely for discharging the Old Company's debt to the United States, for additions and betterments, etc. After deducting the Trust Fund, the remaining uncapitalized portion, amounting to $2.50 a share, was to be used, so far as necessary, for the payment of reorganization expenses not chargeable to the Trust Fund. These reorganization expenses included the costs of foreclosure, including court allowances, printing and engraving of securities of the New Company, the charges of its corporate trustees, transfer agents and registrars, and other expenses incident to the

consummation of the Plan, if consummated. Any balance remaining in the hands of the Managers out of the amounts received from the depositing stockholders of the Old Company (other than the Trust Fund), after the disbursements authorized for the purposes stated above, were to be paid over to the New Company (R. 39-40).

The effect, as well as one of the expressed purposes,* of the Plan was to bring about the reorganization without burdening the New Company with additional capitalization for reorganization expenses. There was, however, a marked distinction between the method employed for the accomplishment of this purpose in respect of payment for services rendered to the depositing security holders for the protection and preservation of their interests, and the method employed for the payment of other reorganization expenses attributable to the foreclosure and to the launching of the New Company. The funds for the former were to be set aside in the Trust Fund, the New Company having no interest therein; while the funds for the latter were to be accounted for to the New Company, which was to be entitled to any residue.

It will be observed from the foregoing that:

(1) The Trust Fund was created out of the moneys of the depositing security holders.

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*Among the stated purposes of the Plan as described therein (R. 33) was

"(*g*) Payment of all the expenses of the reorganization out of that part of the payments by stockholders for which new securities are not to be issued, thus accomplishing all the foregoing advantages without expense to the creditors and without burdening the System with additional capitalization for such expenses."

(2) The only payments to be made out of the Trust Fund were for services performed directly for such depositing security holders or for their agents, the Managers and the Committees.

(3) No securities of the New Company of any description were to be issued against the Trust Fund, which absorbed but a little over one-third of the uncapitalized portion of the stockholders' assessments.

(4) The New Company was to have no interest, legal or equitable, in the Trust Fund and was to be under no obligation in respect of any of the expenses that were to be paid out of the Trust Fund.

(5) Only the compensation of the Managers and Committees was contingent upon the consummation of the Plan. The Managers and Committees, becoming personally responsible for the authorized employment of depositaries, subdepositaries and counsel performing services in behalf of the depositing security holders, were authorized to resort to the Trust Fund to discharge the obligations thus incurred, whether the Plan was consummated or not.

3. Foreclosure sale, and agreement for conveyance to the New Company, which expressly reserved the Trust Fund from the property to be conveyed.

The property of the Old Company was sold at foreclosure sale to purchasers acting for the Managers, and

on January 29, 1927 the sale was confirmed (R. 7) and the Plan held valid.

On April 11, 1927 (R. 8) the Purchasers, the Managers and the New Company entered into a contract whereby the Purchasers assigned to the New Company (which had been organized on March 31, 1927) all their right, title and interest in the properties of the Old Company, and whereby the Managers agreed, among other things, to pay over to the New Company or, to account to it for, all cash received under the Reorganization Plan *except the Trust Fund* (R. 98). The New Company agreed, in turn, to issue and deliver its securities, as provided in the Plan, to the Managers, and to assume all obligations incurred by the Managers, *other than those to be discharged out of the Trust Fund* (R. 99). These obligations, incurred under the authority of the Plan, remained the obligations of the Managers and Committees for which they were subject to personal suit and for the discharge of which they were entitled under the Plan to resort to the Trust Fund.

Thus the above-mentioned purpose of the Plan respecting the Trust Fund and the expenses payable therefrom was accomplished: the Trust Fund was expressly excepted from the moneys to be paid to the New Company, and the expenses payable out of the Trust Fund were expressly excepted from the obligations assumed by the New Company.

4. Proceedings before the Commission and the action taken thereunder.

On April 11, 1927 (R. 8-9, 101) the New Company applied to the Commission for:

(1) A certificate of public convenience and necessity under paragraphs 18-21 of Section 1 of the Interstate Commerce Act for the acquisition and operation by it of the lines of the Old Company;

(2) An order under paragraph 2 of Section 5 of the Act for the acquisition of control by purchase of stock or by lease of certain railroad properties controlled by the Old Company; and

(3) An order under Section 20a of the Act, authorizing and approving the issue of its securities as provided in the Reorganization Plan.

On January 4, 1928 (R. 9) the Commission issued its report, certificate and order (R. 117-165). In its report the Commission found (1) that the public convenience and necessity required the operation by the New Company of the lines of the Old Company; (2) that the acquisition by the New Company of control of the subsidiary properties was in the public interest; (3) that the railway properties and cash to be received by the New Company under the Plan, *and which excluded the Trust Fund,* constituted an adequate consideration for the securities to be issued. By its order it (*a*) authorized unconditionally the acquisition, operation and control of the properties of the Old Company and its subsidiary companies as prayed, and (*b*) authorized the New Company to issue its securities, in the amounts and in accordance with the terms set forth in the Plan, for the purpose of acquiring such properties, but upon the following conditions (R. 164):

> "*Provided, however,* and the authority herein is granted upon the express conditions, that the applicant (*a*) shall not pay any underwriting fees in connection with the proposed issue of securities; and (*b*) shall impound in a separate fund the money *received* from the payment by holders of preferred and common stock in an amount equal to $4 a share, which shall not be paid out unless and until so authorized by order of the court in respect to payments subject to the court's jurisdiction or by this commission."

On January 12, 1928 (the order having been made on January 4) respondent, in accordance with the aforesaid agreement of April 11, 1927, issued the securities authorized, and delivered them to the Reorganization Managers, in consideration of the transfer to it of the properties of the Old Company and in consideration of the obligation of the Managers to pay to the New Company, or to apply to the expenses of the reorganization, *other than those to be paid out of the Trust Fund,* the cash to be received by the Managers, *other than the Trust Fund.* In carrying out its part of said agreement, the Managers applied the deposited bonds in payment to the Receivership Court for the properties of the Old Company, thereby surrendering the lien on such bonds which the Plan gave them to protect them against obligations incurred through the employment of counsel, depositaries and sub-depositaries (R. 9-10).

At the time of the issuance of the new securities, the Managers did not pay over to the New Company any part of the stockholders' assessments, as such assessments had not then been received, but had been called for pay-

ment on February 16, 1928, with the option of paying one-half on that date and the balance on or before June 1, 1928 (R. 165-166). It was not contemplated that such payments should be received or accounted for to the New Company prior to the transfer of the properties to the New Company and the issuance of its securities. The Managers have since paid over to the New Company, or accounted to it for, all such payments other than the Trust Fund, and have, from time to time, distributed the securities of the New Company to the depositing security holders, in accordance with the Plan (R. 10).

On March 13, 1928, the Commission issued a supplemental order (R. 170), on application of the New Company (R. 165), authorizing it to make certain payments out of that part of the uncapitalized portion of the assessments which it had received, and directing it to file monthly reports showing the amounts used or expended under authority of such order (R. 171). Pursuant thereto, respondent from time to time filed reports showing such expenditures (R. 171, 173, 175, 176, 177, 178). As stated in appellants' brief (p. 13) none of these reports included any item which, under the Plan, was payable out of the Trust Fund; nor did the order of March 13, 1928, or the application upon which it was issued.

On May 22, 1928, the New Company filed with the Commission a second supplemental application (R. 11-12), asking authority to pay certain additional expenses, not payable out of the Trust Fund, to wit, the charges of the corporate trustees and the transfer agent and registrar of the New Company for services performed by them in the authentication and registration of the New Company's securities (R. 180-181).

5. Proceedings in the court below.

The petition, after stating the foregoing and other facts, alleged that representatives of the Commission had stated to the petitioner that such authority to pay the charges of the trustees, transfer agent and registrar would not be granted, and that no further authority would be granted to pay any reorganization expenses, unless and until the petitioner obtained the entire Trust Fund from the Managers and impounded the same in a separate fund to be paid out only when, and in such amounts as, the Commission should authorize; that the petitioner was advised and believed that the defendants (but erroneously) so interpreted the order of the Commission and threatened to enforce the order so interpreted by the institution of civil or criminal proceedings; that so interpreted, the order was void and beyond the power of the Commission to make; and that the Commission was further without power or authority to prohibit payment of the charges of the trustees, transfer agent and registrar or to require the submission to the Commission, for determination, of the charges for any services rendered in connection with the reorganization; and petitioner prayed that the order of the Commission, so far as it purported to impose such requirements, should be set aside and perpetually enjoined (R. 12-16).

The Commission in its answer denied the authority of any of its representatives to speak for it, but in effect admitted that the Commission and the United States interpreted, and expected to enforce, the order as requiring the petitioner to obtain and impound the Trust Fund, as alleged in the petition (R. 187). That such is the posi-

tion of the appellants is conclusively established by the brief filed in this Court as well as by their position in the court below. Appellants also moved to dismiss upon the ground that the condition was an inseparable part of the order and could not be separately enjoined or set aside.

6. Decision of the court below.

The court below overruled the motion to dismiss, and in its opinion (R. 196) held:

> (1) That the order, properly interpreted, did not require the respondent to obtain and impound the Trust Fund, but only to impound the moneys which it received and was entitled to receive under the Plan.
>
> (2) That, as interpreted by the Commission, so much of the order as required respondent to obtain and impound the Trust Fund was void and beyond the authority of the Commission to make, and should be enjoined.
>
> (3) That, however, it was within the power of the Commission to require the submission to it for its approval of all reorganization expenses and charges payable out of moneys in respect of which the respondent was entitled to an accounting, *i.e.*, all expenses and charges other than those to be paid out of the Trust Fund.

The court entered a final decree (R. 204) in accordance with this opinion.

From this decree only the United States and the Commission appealed. Therefore the holding of the court below set forth in paragraph (3) *supra,* as to the right of the Commission to subject to its jurisdiction reorganization expenses other than those payable out of the Trust Fund, is not before the Court on this appeal.

Questions Presented.

1. Does the order require respondent not only *to impound* the moneys attributable to the uncapitalized portion of the assessments against the stockholders of the Old Company which respondent actually received, or for which it was entitled to an accounting, but also *to obtain and impound* the Trust Fund, which it is not entitled to receive and in which it has no interest, legal or equitable?

2. If so, may the Commission, under the guise of a condition imposed upon an authorization of securities, draw to itself a jurisdiction (not expressly conferred), (*a*) to revise or abrogate the contract by which the depositing security holders of the Old Company provided for payment of compensation for services rendered to themselves in the reorganization of the Old Company, out of a fund specifically created by them for that purpose, in which the New Company has no interest, legal or equitable, and against which none of its securities were to be or have been issued, and (*b*) to regulate the compensation and to pass upon the expenses of persons performing such services?

3. If the Commission had no such power, did the court below have jurisdiction under the Urgent Deficien-

cies Act (which confers jurisdiction over all suits "to enjoin, set aside, annul or suspend *in whole or in part* any order of the Interstate Commerce Commission") to enjoin or set aside the condition imposed insofar as the same purports to require the respondent to obtain and impound the Trust Fund?

Perhaps the first of these questions should logically be discussed first; but, as one of the grounds for construing the order as the court below construed it is that the Commission's construction renders it invalid, the validity of the order, as so construed, is dealt with first in the argument which follows.

Statute Involved.

The power asserted by the Commission in this case was sought to be exercised under Section 20a of the Interstate Commerce Act (U. S. C. Title 49, Sec. 20a), the applicable provisions of which are as follows:

> "(2) * * * It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issues and the proceeds thereof, or of the proposed assump-

tion of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

"(3) * * * The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2)."

ARGUMENT.

I.

THE CONDITION IMPOSED, IF CONSTRUED SO AS TO REQUIRE PETITIONER TO OBTAIN AND IMPOUND THE TRUST FUND, TO BE PAID OUT ONLY AS AUTHORIZED BY THE COMMISSION, IS VOID.

1. The necessary effect of the condition, so construed, was to revise, or to abrogate, a contract between holders of securities of a carrier for the payment of compensation for services rendered to themselves, which were not to be paid for by the carrier, and in respect of which the carrier issued no securities, and to subject to the Commission's determination the fees and expenses of the persons rendering such services. Such an interference with the right of private contract is not within the Commission's powers.

The Reorganization Plan was a contract between depositing security holders, the Managers and the Committees, to which neither the Old Company nor the New Company was a party. Neither the parties to the contract nor its subject matter were within the jurisdiction of the Commission. The Managers were authorized by the Plan to employ sub-agents, to-wit, depositaries and sub-depositaries, and the Managers and Committees were authorized to employ counsel and incur expenses for the benefit of the security holders. None of the persons performing such services are subject to the jurisdiction of the Commission. For the services

performed by them they were entitled to be paid. Consequently the Plan provided that out of the payments to be made by the depositing stockholders to the Managers, an amount equivalent to $1.50 a share should be set aside as a special fund to be devoted to paying the compensation and expenses of the persons named. The balance, if any, the Managers were authorized in their discretion either to pay over to the New Company or to return *pro rata* to the depositing stockholders. No securities of the New Company were to be issued against this fund. The New Company acquired no interest in it and assumed no obligation for any of the charges payable out of it.

The contract thus made was an ordinary business arrangement by which certain private persons were to perform services for certain other private persons and were to be paid for such services. The Managers' compensation was fixed by the contract itself, as the parties had a right to fix it. The depositing security holders also delegated to the Managers, as their agents, the right to agree upon the compensation of the other persons performing services for them under the contract. This the parties likewise had the undoubted right to do. The moneys out of which such payments were to be made remained at all times the moneys of the depositing stockholders, and were to be disposed of by their agents, the Managers, in accordance with the Plan. At their option, the Managers were permitted either to return such moneys to the depositors or to pay it over to the New Company as additional working capital. Until this election was made, the fund remained the private property of those who had contributed to it. Those provisions of

the contract relating to the creation and use of the Trust Fund related to private rights and obligations only. No public interest was involved.

The necessary effect of the condition imposed, as interpreted by the Commission, is to override, abrogate or revise this contract, notwithstanding that none of the parties concerned are carriers and none of the services affected were rendered to any carrier. For payments to be made in accordance with the contract, it substitutes payments to be made only on order of the Commission. It has the effect of annulling the contract with the Managers for a fixed compensation for their services to the depositing security holders, and of limiting them to such compensation as the Commission may fix. It interferes with the right of contract by preventing those persons whose compensation was not fixed in the Plan from agreeing with the Managers thereon. Instead, they are limited to such compensation as the Commission may fix. It likewise deprives each of such persons of their right, failing such agreement, to recover the reasonable value of their services as determined by a jury, and substitutes for such determination the determination of the Commission.

By this means, the Commission seeks to create for itself a jurisdiction to regulate the fees and expenses of private persons, not subject to its jurisdiction, performing services for other persons likewise not subject to its jurisdiction. As hereinafter pointed out, no power so to override, abrogate or revise contracts, or to deprive private persons of their legal remedies, has been expressly conferred upon the Commission. If so conferred, it would be, to say the least, of doubtful constitutionality.

In order to avoid the inevitable consequences of the order so construed, it is said in appellants' brief (pp. 35-36) that the only effect of the order is to transfer the custody of the fund from the Managers to the New Company; that it prohibits only *voluntary* payment in excess of amounts approved by the Commission; and that "any claimant dissatisfied with the decision of the Commission still has his day in court and he has the same legal remedies that he would have had if the Commission had not taken jurisdiction over payment of reorganization expenses." This argument appears to be entirely inconsistent with the argument previously made in the brief, as to the necessity for the exercise of the asserted power of the Commission in order that it may regulate and limit expenses in reorganizations. For, unless the Commission has the power of *determination*, the order is wholly ineffectual to achieve its stated purpose.

However, under the limitation now suggested the order is equally void, since it still has the effect of overriding the contracts of persons not subject to the jurisdiction of the Commission, relating to their own private affairs, and seeks to compel suits between private parties respecting compensation for services performed by one for the other, and in respect of which they are themselves in agreement.

The contract, furthermore, provides that the Trust Fund shall remain in the custody of the Managers; and even under the suggested limitation, the order of the Commission annuls that provision of the contract and transfers the fund to the custody of the New Company.

Again, under the contract, the moneys deposited remained the property of the depositing stockholders, until paid out in discharge of the obligations created by the contract and until the Managers have exercised their election either to pay the balance over to the New Company or to return it *pro rata* to the depositing stockholders; but the order, as now interpreted, destroys both the existing property right of the depositing stockholders and their right to receive such balance, if the Managers elect to return it to them.

It is not clear from the appellants' brief what effect the order, as now interpreted, has upon the contract compensation of the Managers, *i. e.*, whether they are still entitled to the contract compensation, even though in excess of that determined by the Commission, or whether they are limited to the latter. In either event the order is clearly bad. If they are entitled only to the latter, the result is to set aside a valid and enforcible contract. If they are entitled to the former, although in excess of the latter, they are required first to submit their compensation to the Commission for review, and this, in addition to rendering the order both ineffectual and absurd, postpones payment to the loss and detriment of the Managers and requires them to incur such expense as may be involved in undertaking to justify their contract compensation before a tribunal to which, under this latest interpretation of the order, it is a matter of no ultimate concern.

So far as concerns those persons whose compensation is not fixed by the Plan, the order deprives them of the right to agree with the Managers upon the amount of

their compensation and to receive in payment the amount so agreed upon. They are thus deprived of their right of private contract and required instead to submit their compensation first to the determination of the Commission. Then, if they are dissatisfied, they may sue, thus becoming involved in the expense of litigation, in addition to the consumption of such time and money as may be required in the proceedings to be had before the Commission.

We are not told what legal effect, if any, the Commission's determination would have in any subsequent suit, under the construction of the order now taken by the appellants. It will hardly be contended that it would constitute *prima facie* evidence of the reasonable value of the services performed, and it would appear to be of no evidentiary value whatsoever. Under the construction now suggested, the order of the Commission becomes a mere idle gesture. This argument, in fact, is an admission that the Commission may not lawfully regulate the payments to be made to persons entitled to be paid out of the Trust Fund for services performed.

2. The power to impose conditions in respect of the issuance of securities is not unlimited. The conditions imposed must be germane to the subject matter and material to issues which the Commission has been given power to determine.

The Commission is a body of limited jurisdiction. It may not by indirection exercise powers, the express grant of which has been withheld. *Interstate Commerce*

Commission v. *Cincinnati, N. O. & T. P. Ry.*, 167 U. S. 479; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407; *United States* v. *Louisville & Nashville R. R.*, 236 U. S. 318; *United States* v. *Pennsylvania R. R.*, 242 U. S. 208. This it may not do even in cases, such as those cited, where it is at least arguable that the exercise of the implied power asserted was essential in order effectively to carry out the powers expressly granted. Much less may the Commission by indirection exercise a power not expressly conferred and not even remotely related to the powers expressly conferred.

The power to impose conditions conferred by paragraph (2) of Section 20a is not an unlimited power. It will scarcely be contended that permission to issue securities could be conditioned upon a proviso that a certain person should be elected as President and retained so long as the securities remained outstanding, or that certain persons should be removed from the Board of Directors, or that brokerage fees on all purchases and sales of such securities on the New York Stock Exchange should, as paid, be impounded by the New Company (to which they did not belong), to be paid out to the brokers effecting such purchases and sales in such amounts as might be approved by the Commission. Yet the condition here imposed is of precisely the same character as that last described.

The condition must be germane to the subject matter and fairly within the exercise of the powers expressly delegated. Cf. *People ex rel. N. Y. C. & H. R. Co.* v. *Commission*, 227 N. Y. 248; *People ex rel. Binghamton L., H. & P. Co.* v. *Stevens*, 203 N. Y. 7. The Commis-

sion cannot, under the guise of administering this or any other section of the Act, draw to itself powers not conferred upon it by the Act. Cf. *Kuenster* v. *Meredith,* 264 Fed. 243; *School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94; *United States* v. *United Verde Copper Co.,* 196 U. S. 207; *People ex rel. N. Y., N. H. & H. R. Co.* v. *Willcox,* 200 N. Y. 423. Nor can it, by conditions attached to its approval, coerce interested carriers, and persons not subject to its jurisdiction, into consenting to a control over matters which Congress has withheld from its control. The power of regulation cannot be used to advance some general policy, however laudable, or to accomplish some purpose of the Commission, outside of the Act, when the powers conferred by Congress are not sufficient to achieve those ends. *Morrill* v. *Jones,* 106 U. S. 466; *Waite* v. *Macy,* 246 U. S. 606.

3. The condition imposed was not within the express or implied powers of the Commission.

(a) THE CONDITION IMPOSED HAD NO RELATION TO ANY ADMINISTRATIVE QUESTION COMMITTED TO THE COMMISSION FOR DETERMINATION.

The Act does not invest the Commission with arbitrary power to determine under what circumstances and upon what conditions authority to issue securities may be granted or denied. Such a grant of authority would not only be invalid as a delegation of legislative power without the prescription of a standard, and therefore invalid (see *Field* v. *Clark,* 143 U. S. 649, 692-694; *Union Bridge Co.* v. *United States,* 204 U. S. 364, 384-385;

United States v. *Grimaud,* 220 U. S. 506, 522), but it would be a delegation of power which Congress does not itself have—since Congress can subject the railroads only to such regulation as is reasonably connected with the regulation of interstate commerce. See *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 479 *et seq; Wilson* v. *New,* 243 U. S. 332, 346-347. In exercising this jurisdiction, as in exercising other powers under the Interstate Commerce Act, the Commission must apply to each case the standards created by the Act itself and reach its determination accordingly. See *Chicago Junction Case,* 264 U. S. 258, 263-266. It may not substitute for such standards other standards of its own. *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433. The Act provides:

> "* * * The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose" (49 U. S. C. A. §20a (2)).

Paragraph (3) confers upon the Commission the power

> "to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary

or appropriate in the premises * * *" (49 U. S. C. A. §20a (3)).

It may not be doubted that if the Commission, although making all of the findings required by paragraph (2), should deny an application for the issuance of securities without reason, or should assign as a reason therefor grounds having no relation to the standards established by paragraph (2), it could by mandamus be compelled to enter an order authorizing their issuance. *United States* v. *Schurz,* 102 U. S. 378; *Butterworth* v. *Hoe,* 112 U. S. 50; *Illinois State Dental Examiners* v. *People,* 123 Ill. 227; *Matter of Picone* v. *Commissioner of Licenses,* 241 N. Y. 157; *People ex rel. South Shore T. Co.* v. *Willcox,* 196 N. Y. 212; *State ex rel. Mauldin* v. *Matthews,* 62 S. E. 695 (S. C.). Similarly, terms and conditions, if imposed, must be for the purpose of bringing the issue within the purposes and objects expressed in paragraph (2).

Under paragraph (2) the Commission must find, first that the issue proposed by the Company "is for some lawful object within its corporate purposes, and compatible with the public interest." The object of the proposed securities in the present case was the acquisition by the New Company of the properties of the Old Company. The order of the Commission expressly certifies that the present and future public convenience and necessity require the acquisition and operation of the properties of the Old Company by the New Company, and expressly authorizes its acquisition of control of other companies previously controlled by the Old Company, as in the public interest (R. 163). The Commission thus expressly found that

"the object" for which the securities were to be issued was one "compatible with the public interest." It was, of course, within the applicant's "corporate purposes."

The Commission must next determine whether the issue proposed and its object are "necessary for, or appropriate, or consistent with the proper performance by the carrier of its service to the public as a common carrier, and will not impair its ability to perform that service." That the object of the issue, to wit, the acquisition of the lines of the Old Company, was necessary and appropriate for the proper performance by the New Company of service to the public as a common carrier, necessarily follows from the certificate that public convenience and necessity require the acquisition of the properties of the Old Company, to acquire which the securities were to be issued.

In the determination of these jurisdictional facts the Commission may also without doubt inquire into the consideration, and into such matters as the rate of interest to be paid, etc. In other words, it may guard against the improvident issuance of securities, although the object of such issue may be compatible with the public interest. Otherwise, the ability of the carrier to perform its public service might be impaired. As hereinafter appears, the Commission expressly and unconditionally found the contract consideration, which expressly excluded the Trust Fund, to be adequate to support the securities authorized. It approved the amount and classes of securities to be issued, the rates of interest to be paid, etc. Manifestly, therefore, the ability of the carrier to perform its public service would not be

impaired either by reason of the object for which the securities were to be issued, to wit, the acquisition of the properties of the Old Company, or by the issuance of the new securities necessary to accomplish such purpose. That the issuance of the securities proposed was reasonably necessary and appropriate for the purposes sought is, of course, plain. The condition imposed, therefore, had no relation whatever to the matters and the only matters committed to the determination of the Commission in granting or withholding its approval. This being so, it could not qualify either its order or its ultimate findings by the condition sought to be imposed.

If the Commission had imposed the condition that some part of the properties should not be included in those to be taken over by the New Company, on the ground that their inclusion was not compatible with the public interest, or if it had found that the rate of interest on one of the bond issues was excessive, and had imposed the condition that it should be reduced, on the ground that the higher interest rate would, in the Commission's opinion, impair the ability of the carrier to perform its public service, the condition would have been pertinent to the issues. Or, if the Commission had found the consideration for the securities to be issued inadequate by the amount of $1.50 per share, and had conditioned its order upon the receipt of an additional consideration in that amount, such a condition would have been appropriate. If it had done this, however, the interested parties would have been free to raise that sum by an additional assessment. With this done, the condition would be fully satisfied, but the Commission would be

without jurisdiction over reorganization fees and expenses, and the Trust Fund would continue to be the source from which such payments were to be made.

The condition imposed related to matters wholly outside the jurisdiction of the Commission and, having no bearing upon the jurisdictional facts found, was void and mere surplusage.

(b) THE CONDITION MAY NOT, AS SUGGESTED BY APPELLANTS, BE SUSTAINED AS A REQUIREMENT FOR THE RECEIPT OF ADDITIONAL CONSIDERATION FOR THE SECURITIES TO BE ISSUED.

In the answers (R. 187-188) and in the court below, appellants undertook to support the order as one requiring the receipt by the New Company of an additional consideration beyond that contracted for. This contention is faintly renewed in appellants' brief in this Court (p. 35). It is entirely without merit. Such was not the purpose or effect of the condition. On the contrary, the Commission itself expressly found that the contract consideration, which in terms excluded the Trust Fund, was fully adequate to support the full amount of the securities sought to be issued. In its report (R. 136) the Commission says:

> "In the instant case the testimony is that the value of the properties proposed to be acquired ranges from $640,000,000 to $900,000,000. For purposes of argument, the Jameson Committee took $700,000,000. The book value on May 31, 1927, in round numbers was $707,000,000. Against these values or this investment there

> will be outstanding after the proposed reorganization the following: Undisturbed bonds, excluding $22,129,000 of bonds assumed pursuant to the lease of Terre Haute, $160,001,960; 50-year 5 per cent. mortgage gold bonds, $106,395,096; adjustment mortgage bonds, $182,873,693; preferred stock, $119,845,800; total, $569,116,549. Using the lowest figure, $640,000,000, and deducting from that amount the total par value of the securities enumerated, or approximately $569,100,000, would leave $70,900,000 as representing the value of the 1,174,060 shares of common stock without nominal or par value. In the hypothetical balance sheet as of May 31, 1927, the applicant shows $174,342,841.64 for the book value of the common stock. Without expressing any opinion as to the value of the no par value common stock, it would appear that upon applying the test suggested *there will remain an unmortgaged equity in the properties sufficient to permit the bondholders to assign to the stockholders an interest therein and to support the issue of stock in the amounts proposed.*"

The Commission thus affirmatively found that the value of the properties of the Old Company, exclusive of the free cash which the New Company was to receive, was sufficient to support the issuance of the proposed securities having a par value, and to warrant the proposed issue of no par value common stock. That the condition was not imposed upon the theory that, without it, the consideration for the securities would be inadequate is also conclusively shown by the concurring opinion of Commissioner Hall, who said (R. 142-143):

> "I am in accord with the conclusions authorizing issuance and assumption of liability in respect of securities and granting certificate of public convenience and necessity. I do not conceive that as a commission we have anything to do with the application which may be made of the four dollars per share paid in to the reorganization managers by existing stockholders. What those stockholders do with their money is their affair unless and until some part of that money is paid over to the applicant. We are not dealing with the merits or demerits of the reorganization plan as such."

Moreover, if the consideration was inadequate it was the duty of the Commission so to find and also to find the extent of the deficit. It did neither. That the purpose of the condition was not to provide an adequate consideration, but to regulate compensation and fees payable out of the Trust Fund, is established by the foregoing excerpts from the Commission's report and from concurring opinion of Commissioner Hall.

(c) THE CONDITION MAY NOT BE SUSTAINED UPON THE OTHER GROUNDS URGED IN APPELLANTS' BRIEF.

Appellants urge that the condition should be sustained because, if the Commission could exercise the power which it sought to exercise, the result would be to keep railroad financing charges as low as possible (App. Br., p. 19), and they urge the analogy of cases in which the Commission has required competitive bidding for equipment trust certificates and has prohibited underwriting

commissions to be paid in connection with security issues (App. Br., pp. 27-28).

There is no analogy between the condition sought to be imposed by the present order and the requirement of competitive bidding for equipment trust certificates or the prohibition of underwriting commissions, which are cited by the appellant as instances of the Commission's exercise of power "to keep financing charges as low as possible." If the Commission's power to impose such requirements is to be supported, it is only as an exercise of the Commission's authority to see that the carrier receives an adequate consideration for securities which it issues. And in the present case, as stated, the Commission found the contract consideration, which expressly excluded the Trust Fund, to be adequate. The Commission may no doubt inquire into the reasonableness of commissions to be paid *by the carrier*, and into the reasonableness of any discounts to be suffered *by it* in the sale of its securities; but here the carrier paid no commissions and suffered no discounts. The Trust Fund did not constitute any part of the cost *to the carrier* of its financing; and in fact, the only cost of financing to the New Company under the Plan was the expense incidental to the printing, engraving, authentication and issue of its securities. The Trust Fund was created for the express purpose of paying, without cost to the New Company, the debts of the security holders of the Old Company, for services rendered to them in the protection and preservation of their interests, and, in largest part, rendered long before the New Company came into existence. The costs thus incurred were not the costs

of any carrier, *were not to be borne by any carrier,* and none of the securities were issued against the fund out of which these private debts were to be paid. The amount so to be paid was a matter solely between the depositing security holders and their agents and representatives who performed such services.

In apparent recognition of these facts, the order is sought to be supported (App. Br., pp. 29-30) as an exercise of a power to protect investors in railroad securities against unreasonable reorganization charges. Of course, no such power has been expressly conferred by the statute. The primary purpose of the Interstate Commerce Act is the protection of the public interest, and the primary purpose of Section 20a is to prevent carriers from weakening themselves financially by improvident issues of securities, and thereby disabling themselves from giving adequate service to the public at reasonable rates. In order to afford this protection to the public, Congress has laid down certain definite tests in Section 20a which the Commission is to apply in determining whether securities should be authorized. When the Commission has applied those tests, its power is at an end, and it has no authority to impose its own standards of public interest or to concern itself with contracts between private parties which do not in any particular affect the public interest. Of course, whenever the Commission in exercising its jurisdiction under Section 20a, prevents improvident security issues, the result is to strengthen railroad credit and protect railroad investors; but Congress has committed to the Commission no independent jurisdiction to protect railroad in-

vestors and certainly no jurisdiction to regulate their private contracts.

Moreover appellants' argument loses sight entirely of the nature of that part of the Plan which related to the Trust Fund, and of the relation between the depositing security holders, the Old Company, the New Company, the Managers and all other persons performing services for the depositors. The depositing security holders were investors whose investment had been placed in jeopardy by the receivership and by the probable foreclosure and sale of the properties of the Old Company. The persons who performed services that were to be paid for out of the Trust Fund, performed them for the protection and preservation of that investment. What they were paid for performing such services was no more the concern of the Commission than were the charges of the opposing protective committees and their counsel, who, in the protection of their supposed interest, opposed the Plan. The fact that this Plan, and not the opposition plan, was approved by the Court, as a result of which securities of the New Company were issued thereunder, has no bearing upon the nature of the indebtedness to be discharged out of the Trust Fund, or of the rights of the interested parties to make and carry out their contract without interference from the Commission. The Commission has no more authority to regulate the charges in question than it would have to regulate the charges of a firm of attorneys, engineers or bankers employed by some individual security holder of the Old Company to advise him in the situation.

Nor may the power asserted be inferred because the contract made and the services rendered relate to the re-

organization of an interstate carrier. Any such reorganization necessarily involves the incurring of expenses for the benefit and protection of the interests of the security holders. The agents chosen by them for this purpose, and the compensation to be paid to such agents for services rendered to the security holders, are not matters of public interest, or in which the Commission has any concern. It was for the parties to such reorganization to determine whether such expenses should be capitalized and ultimately borne by the New Company, or whether they should be paid by the security holders of the Old Company. What the powers of the Commission would have been, if the Plan had provided for the capitalization of such expenses, or for their assumption by the New Company, it is unnecessary to consider. As it provided that they should be borne by the participating stockholders of the Old Company out of a Trust Fund to be specially provided by them for the purpose, and in respect of which the New Company issued no securities, no power resides in the Commission to revise or abrogate the contract so made, or to pass upon the compensation to be paid for the services rendered, or upon the expenses for which the persons rendering such services were entitled to reimbursement.

If provision for paying for such services had been made in a separate contract between the security holders and the persons performing the services for them, it would hardly be contended that the Commission acquired jurisdiction to regulate the compensation for such services, merely because they were performed in connection with the reorganization of a railroad. Yet the legal effect on the rights of the parties is

precisely the same in both cases. If instead of thousands of security holders there had been ten, and the ten had entered into a contract with the Managers and others for the performance of the same services, and had agreed to pay the Managers the amount stipulated in the Plan, no one would think of contending that the Commission would have any authority to review, revise or abrogate such a contract.

Questions of the fairness of a reorganization plan, of the relative treatment accorded the different classes of security holders, or the propriety of the assessments required of the stockholders as a condition to their participation in the plan, and all other questions of private rights arising in a reorganization, are questions outside the jurisdiction of the Commission and within the established jurisdiction of the federal courts. *Northern Pacific Railway Company* v. *Boyd*, 228 U. S. 482; *St. Louis-San Francisco Ry.* v. *McElvain*, 253 Fed. 123; *St. Louis-San Francisco* v. *Wall* (D. C. E. D. Mo., Cons. Cause Eq. No. 4857, July 1, 1918); *Phipps* v. *Chicago, R. I. & P. Ry.*, 284 Fed. 945; *Chicago, R. I. & P. Ry.* v. *Lincoln H. & M. Commission Co.*, 284 Fed. 955. One of the provisions of the Plan, affecting the rights of the participants therein, was the setting aside of $1.50 per share of the assessments as a Trust Fund for the payment of expenses incurred for their benefit. Under the cases cited, any interested party might have come into the Receivership Court and raised the whole question of the propriety and fairness of this provision or any other provision of the Plan. Indeed, this question was raised by the dissenting Com-

mittee. All objections to the provisions of the Plan were heard by the Receivership Court in the exercise of its jurisdiction, and that court in its decree confirming the sale* the objections and approved the Plan. See *Jameson* v. *Guaranty Trust Co.*, 20 F. (2d) 808, 810. Objectors to the Plan appealed to the Circuit Court of Appeals, which likewise found the Plan in all respects fair, and a writ of *certiorari* was denied by this Court. The decision in that litigation, therefore, is *res adjudicata* in respect of all questions of private right arising under the Plan.

On application to the Commission for authority to issue the securities necessary to carry out the Plan, the Commission was not possessed of any authority to review the decision of the courts. Under Section 20a it is empowered to pass upon security issues, including those made pursuant to reorganization plans. But in passing upon any issue of securities, whether under a reorganization plan or not, it is limited to the performance of the

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*This decree which, as stated in appellants' brief (p. 15) was the only evidence offered in the court below, was for some reason not made a part of the printed record before this Court. It is understood that the Clerk of the District Court is forwarding such decree to the Clerk of this Court for incorporation in the record. It provided as follows:

"The provisions of the Reorganization Plan affecting the respective priorities of all persons and corporations interested in the Railway Company and its property are equitable and the Reorganization Plan contains an equitable and timely offer of participation in the reorganization thereby proposed to all persons entitled thereto, of which due and reasonable notice has been given; and all complaints as to the equity of the provisions of the Reorganization Plan made at said hearing are hereby found without merit and overruled and all persons, firms and corporations are forever barred from making hereafter any complaint in respect of the Reorganization Plan or any provision thereof."

administrative functions expressly conferred upon it, and is concerned only with matters affecting the securities to be issued and the public interest in the carrier which issues them. With reorganization plans as such, and with the private rights of the parties thereto, it has no concern; and in *Miller* v. *United States,* 277 Fed. 95, a statutory court for the Southern District of New York, composed of Judges Hough, Learned Hand and Augustus N. Hand, so held.

It is urged (App. Br. 19-20) that, because at the election of the Managers the New Company might ultimately receive any balance remaining in the Trust Fund, the condition was valid on the ground that it is appropriate for the Commission to reserve jurisdiction over the payment of expenses which directly affect the proceeds to be derived from a carrier's securities.

But this argument ignores the fact that the Trust Fund was no part of the proceeds of sale of such securities.

The New Company did not issue its securities to the security holders of the Old Company, but to the Managers; and the consideration for the issue of such securities was not the amount of the assessments paid by stockholders of the Old Company to the Managers, but consisted of (1) the properties of the Old Company and (2) so much, and only so much, of the cash raised by the stockholders' assessments as, by agreement in the Plan, was to be paid over to the New Company. The depositing stockholders paid their assessments, not to the New Company, but to the Managers; and such pay-

ments were made, not only to enable the Managers to pay for the securities of the New Company, but also to enable the Managers to make other payments, *i.e.*, of expenses incurred for the benefit of the security holders of the Old Company—expenses which had no relation to the securities of the New Company or the consideration which it was to receive for them.

The legal situation may be illustrated by a simple analogy: A employs B to purchase securities from C for $100,000, and pays B $105,000 to cover the purchase price and B's expenses and compensation. In that case, while the extra $5,000 may be part of the total cost of the securities to A, it is certainly no part of the consideration received by C on the sale, and, as to him, no part of the proceeds of the sale of his securities.

So in the present case, while it may be argued that the whole amount of the stockholders' assessments can be regarded as part of the cost to them of the securities of the New Company, it certainly may not all be regarded as part of the consideration which the New Company received for such securities. When the Managers had received the securities of the New Company, they resold or distributed such securities to the depositors. Thus there were two separate transactions, in which the considerations were not the same: (1) the issue of securities by the New Company to the Managers for the *considerations which the New Company was entitled to receive* under the Plan, and (2) the distribution or resale of these securities by the Managers to the depositing security holders, for the *considerations which such security holders were required to pay* to the Managers under the

Plan. The amounts which the stockholders paid to the Managers did not determine what the New Company was to receive for its securities. It was the agreement of the Managers, pursuant to the Plan, to pay over *part* of such assessment to the New Company, that determined the consideration which the New Company was to receive; and that agreement, as well as the Plan, expressly and in unmistakable language excluded the Trust Fund from that consideration.

The Plan might have provided merely that the $4 per share assessment would be applied by the Managers to reorganization expenses, any unexpended balance to be returned *pro rata* to the depositing security holders; and in that event no one would contend that the assessment bore any relation to the consideration for which the new securities were to be issued. Yet that is precisely what was provided in respect of the Trust Fund, except that the Managers, as agents of the depositing security holders, were given the power either to return the excess or to pay it to the New Company as additional working capital. That grant of power and the possibility that it might be exercised in favor of the New Company, did not change the consideration for which its securities were issued. If the Managers should elect to pay over the balance of the Trust Fund, if any, to the New Company, such payment would amount, in legal contemplation, to nothing more than a voluntary contribution by the stockholders to an enterprise in which they all were interested.

(d) THE EXERCISE OF IMPLIED POWERS SUCH AS THE COMMISSION HERE SOUGHT TO EXERCISE WOULD RESULT IN EXTENDING ITS JURISDICTION FAR BEYOND WHAT CONGRESS INTENDED IN THE INTERSTATE COMMERCE ACT.

It requires but a casual reading of the Act to show that the condition imposed by the present order, with respect to payments out of the Trust Fund, was not germane to any power conferred upon the Commission in connection with securities issues. Consider the extent of the implied power of the Commission to impose conditions under this and other sections of the Act, if the power asserted in this case be sustained. Under paragraph (20) of Section 1, the Commission is empowered to impose "such terms and conditions as in its judgment the public convenience and necessity may require" upon the issuance of certificates of public convenience and necessity for the construction of new lines. If, under the guise of a condition attached to the issuance of securities under Section 20a, the Commission may regulate compensation and fees of the Managers and other agents of the security holders of the Old Company, there is no reason why it may not, by conditions imposed upon certificates under paragraph (20) of Section 1, regulate the wages of labor and the prices of materials to be paid in the construction of new lines, or require such new lines to be constructed under supervision of the Commission's engineers, or prohibit the purchase of right of way until the price to be paid for the same has been approved by the Commission.

Similarly, if this condition is valid, the Commission may, under guise of a conditional order granting authority under paragraph (2) of Section 5 for the acquisition of control by one carrier of another, seek to regulate the salaries and wages of officers and employees operating such line in the future, or the prices to be paid for coal and other supplies consumed in its operation, or to require that its operation shall be conducted under the supervision of the Chief of the Commission's Bureau of Operations or some other designated representative of the Commission. If this order is valid, it may, where securities are sought to be issued under Section 20a for the purpose of making additions and betterments to existing property, for which no certificate of convenience under Section 1 is necessary, require that such improvements shall be made under the supervision of engineers in the employ of the Commission, and that the wages of labor, prices paid for materials and contracts for construction shall all be subject to the approval of such engineers or of the Commission. The Commission, of course, has no such authority. Neither has it the authority asserted here.

Furthermore, in each of the cases assumed the conditions suggested relate to contracts or other business undertakings *of a common carrier subject to the Interstate Commerce Act.* The power asserted here goes further, and involves an assertion of jurisdiction over the contracts of *non-carrier persons made with each other, and not affecting the carrier.*

An analogous case would be one in which a railroad company applied for authority to issue $100,000 of bonds

in payment for a piece of land belonging to A, in the sale of which A had employed the services of B, a broker, and had agreed to pay B a commission of five per cent. if the sale were consummated. The Commission would have authority to determine whether the purpose for which such bonds were to be issued was compatible with the public interest, and whether such issue in the amount and on the terms proposed was consistent with the proper performance of the railroad's duties as a common carrier, or would impair its ability to perform such duties. But manifestly it could not, as a condition to such issue, require the railroad company to obtain from A, or from B if it had already been paid to him, B's agreed commission of $5,000, and impound it in a separate fund, out of which the railroad company should pay to B such compensation for his services to A as the Commission might approve as fair and reasonable.

The only difference between the case assumed and the case in hand is in the relative size of the transactions and number of persons involved. The Commission has no more authority in the one case than in the other to impose a condition the effect of which is to set aside the contract providing for payment of compensation for services rendered to the vendor or vendors.

(e) APPELLANTS' REFERENCES TO THE SO-CALLED ST. PAUL INVESTIGATION CASE ARE EXTRANEOUS TO THE ISSUES HEREIN, AS WELL AS OUTSIDE OF THE RECORD.

Appellants' brief (pp. 33-34) refers to certain statements made by the Commission in *Chicago, Milwaukee & St. Paul Investigation,* 131 I. C. C. 615. The object of

one is to indicate that at some time in the past the present Managers, then acting as bankers for the Old Company, had taken a banker's profit in excess of what the Commission thought was right. The object of the other is to create the impression that the Managers controlled the entire situation, including the appointment of the Committees. The record in the case referred to is not before the Court, and without the record the parties criticized in the excerpts quoted are, of course, in no position to defend themselves against the attack made.

It may be pointed out, however, that the petition alleges that the Committees were appointed by certain of the various classes of security holders whom they represented. This allegation the defendants admitted in their answers. Moreover, as the petition alleges and the answer admits, there were, in addition to the Committees which were parties to the Plan, three other Committees with plans of their own, who invited security holders to become parties thereto, and one of these Committees opposed the Plan to the bitter end. The depositing security holders were not under the domination of the Managers or the Committees, but were free agents to deposit their securities under that plan which, in their opinion, was for their best interests.

The matters referred to are wholly extraneous to any issue before this Court. The case is here on bill and answer, and the issues raised relate solely to the powers of the Commission. It is difficult to find any reason for the injection of matters so foreign to the case at bar, unless there was a purpose to arouse prejudice and divert the attention of the Court from the matters in controversy.

II.

THE CONDITION, AS CONSTRUED BY THE COMMISSION, BEING VOID, WAS NO PART OF THE ORDER, AND RESPONDENT WAS ENTITLED TO DISREGARD IT AND ISSUE ITS SECURITIES; AND THE ENFORCEMENT OF THE ORDER MAY NOW BE ENJOINED NOTWITHSTANDING THAT RESPONDENT HAS AVAILED ITSELF OF THE VALID PART OF THE ORDER.

It is fundamental that an administrative body, or indeed a state, having power to grant or withhold a privilege, may not, by imposing a condition upon such grant, exercise an authority which it cannot exercise directly. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Southern Railway Co.* v. *Green*, 216 U. S. 400; *Terral* v. *Burke Construction Co.*, 257 U. S. 529; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426; *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494.

Such a condition is void, and its enforcement will be enjoined even when the plaintiff has availed itself of the right conferred by that portion of the statute or order which is valid, and to which the condition is attached. In *Terral* v. *Burke Construction Company*, *supra*, an Arkansas statute expressly provided that if a foreign corporation, admitted under it to do business in the state, should remove a case to the federal court, the authority given would become revocable. The Burke Construction

Company applied for and obtained a license to do business in the state under this statute. Thereafter it removed a case to the federal court and, being threatened with revocation of its license, sued to enjoin the enforcement of the condition imposed. This Court held that, since the state was without power to impose the condition, the Company was entitled to enjoin its enforcement, although it had availed itself of the privilege extended by the statute in which the condition was to be found. This it held, notwithstanding the fact that the state could, if it chose, arbitrarily refuse to permit foreign corporations to do business within its borders.

In *Fidelity & Deposit Co.* v. *Tafoya, supra*, it was held that the right of an insurance company to do business within the state might not be withdrawn because it had violated a condition, imposed upon its statutory right to do business in the state, that it should not pay any fee or commission to non-residents of the state for placing insurance within the state, and that, the condition being invalid, its enforcement would be enjoined. *Frost Trucking Co.* v. *Railroad Commission, supra*, held that the State of California could not, as a condition to permitting private carriers to use the highways, compel them to become common carriers; and that a private carrier might use the highways and disregard the requirement. Similarly, many cases have held that a state may not collect a discriminatory tax, imposed as a condition to permitting a foreign corporation to do business within its borders. *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494.

All of these cases turn upon the principle that a power which cannot lawfully be exercised directly may

not be exercised by means of conditions to the granting of a privilege, even where the power to grant or deny that privilege is arbitrary and complete. Much less may such a condition be imposed by an administrative tribunal of limited powers, which may not arbitrarily grant or deny the authority sought. Such conditions, when imposed, are mere surplusage and their enforcement may be enjoined.

The Urgent Deficiencies Act (38 Stat. 219) transferred to the District Court the jurisdiction previously exercised by the Commerce Court under the Commerce Court Act (36 Stat. 539).* That Act expressly conferred upon the Commerce Court jurisdiction over all "cases brought to enjoin, set aside, annul or suspend in whole *or in part* any order of the Interstate Commerce Commission."

The ground of the motion to dismiss was that this jurisdiction does not extend to a suit to set aside or enjoin the enforcement of a part of an order, where such part is inseparably related to the balance of the order, which the court is not asked to set aside. The Commerce Court Act contains no such limitation. The Commerce Court Act clearly contemplated that a part of an order might be valid and other parts invalid, and expressly conferred

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*The Commerce Court Act Provides:

"That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

* * * * * *

"Second: Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

jurisdiction to enjoin or set aside so much of such an order as was invalid. It will scarcely be contended that the condition, if beyond the authority of the Commission to make, acquires validity because of its inclusion in an order the remaining portions of which are valid. The condition, if void, is unenforcible by either civil or criminal proceedings. The Commerce Court Act provided for judicial review of the validity of any order or part thereof, in order to avoid subjecting the carrier against which it is directed to the necessity otherwise of being either coerced into obedience or required to disobey at its peril. Any defense which could be urged in suits for enforcement are necessarily available to the carrier in suits brought to set aside or enjoin any part of such order claimed to be void. If, as interpreted by the Commission, the condition is void, its invalidity would be a complete defense to any action for its enforcement and affords a complete basis for a suit to enjoin its enforcement and to set it aside as so interpreted.

It is said that the court below substituted its judgment for that of the Commission in an administrative matter. The only authority cited is *Procter & Gamble* v. *United States*, 225 U. S. 282. This was a case in which the Court refused to review the action of the Commission in dismissing a complaint brought by a shipper, holding that the power of review was limited to affirmative orders only and did not extend to negative orders. This is an action to set aside and restrain the enforcement of a part of an affirmative order, in the making of which it is claimed that the Commission exceeded its authority. No substitution of administrative judgment can be involved in determining this question of power.

Moreover, the Commission having approved the object of the issue, to wit, the acquisition of the properties of the Old Company, having found the consideration to be adequate, having approved the amount and classes of securities to be issued and the rates of interest to be paid, had exhausted its administrative power. *Miller* v. *United States,* 277 Fed. 95; cf. *People ex rel. Third Ave. Ry.* v. *Public Service Commission,* 203 N. Y. 299. It found all the jurisdictional facts. The condition imposed, relating to matters wholly outside the jurisdiction of the Commission and having no bearing upon the jurisdictional facts affirmatively found, was void, and mere surplusage.

III.

THE CONDITION, PROPERLY CONSTRUED, DID NOT REQUIRE THE NEW COMPANY TO IMPOUND THE TRUST FUND.

The order requires that the New Company "shall impound in a separate fund the money *received* from the payment by holders of preferred and common stock in an amount equal to $4 a share" etc. The Company could, of course, only impound that which it received. The reference to the $4 per share assessment is descriptive of the source of the money to be impounded, when received, and not of the amount to be either received or impounded. Giving to the words used their natural and customary meaning, the condition requires the Company only to impound the money received by it from the designated source, and not to obtain in addition something it was not entitled to receive. If such had been the intention, it could have been expressed very easily by a direction to "obtain and impound" the entire amount of the $4 per share assessments.

But it is said that this intent is made clear by reference to the report, which was made a part of the order. Where the order is ambiguous, the report may no doubt be used to clear up the ambiguity. But here there is no ambiguity. The Commission may state in its report that in its opinion certain things should be done in addition to those directed to be done in the order. It may even admonish the carrier that it expects them to be done,

but, unless directed to be done by the order, they are not within it. And an order, like a statute, if unambiguous as this is, is to be interpreted in accordance with the usual and customary meaning of the words employed.

Moreover, it is by no means plain from the report that the Commission intended to require the carrier to obtain the Trust Fund. It is true that the part of the report leading up to the statement of the condition to be imposed refers to both the reorganization expenses to be paid out of the Trust Fund and those to be paid out of the remaining portion of the $4 a share assessments. But the report itself recognizes that the New Company was not entitled to receive the Trust Fund (R. 140), and when the condition is stated it is phrased, as in the order itself, as a direction to impound the money *"received"* (R. 164). Of course, if the New Company received the Trust Fund, or any part thereof, it was required to impound it; but this is quite different from a direction to obtain it. The Commission knew that this money belonged to the stockholders of the Old Company, and that the New Company was powerless to obtain it, except with the consent of the parties affected. If it had intended to require the carrier to obtain it, as a condition subsequent to the order entered, it seems that it would have said so plainly somewhere in the report, if not in the order.

Finally, a statute or order should be construed, when possible, so as to save its validity. *United States* v. *Delaware & Hudson Company,* 213 U. S. 366. As

construed by the Commission, it is clearly invalid. For this reason alone it should be given the other construction.

Respectfully submitted,

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